



November 4, 2020

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Regional Freedom of Information Officer  
U.S. EPA, Region 4  
AFC Bldg, 61 Forsyth Street., S.W., 9th Flr (4PM/IF)  
Atlanta, GA 30303-8960

Re: Alabama Public Records Law Request Re Plant Barry NPDES Permit No. AL0002879 and 316(a) Thermal Variance

Dear Regional Freedom of Information Officer:

Under the Freedom of Information Act, 40 C.F.R. § 2.100 et. seq., I am requesting an opportunity to inspect or obtain copies of public records pertaining to the Barry Steam Electric Generating Plant in Bucks, Mobile County, Alabama. The remainder of this request consists of three sections: (1) the applicable definitions; (2) the description of the requested records; and (3) the instructions for the timely production of an electronic copy.

### **DEFINITIONS**

**“Public records”** means all documents—regardless of their physical form, characteristics, or means of transmission—made or received by or otherwise in the possession of the United States Environmental Protection Agency (EPA);

**“the Barry Plant”** means the fossil fuel burning plant owned and operated by Alabama Power Company (APC) located in Bucks, Alabama, on the shores of the Mobile River;

**“the proposed 316(a) thermal variance”** means ADEM’s proposed decision, as reflected in in Draft Permit NPDES Number AL0002879, to grant a variance for the Barry Plant’s thermal discharges under the Clean Water Act Section 316(a). See Draft Permit, ADEM Permit Rationale at 4, 10-11;

**“the Draft Permit”** means the draft NPDES Permit Number AL0002879 for which ADEM provided notice to the public on August 19, 2020;

“**EPA**” means the United States Environmental Protection Agency;

“**ADEM**” means the Alabama Department of Environmental Management.

## **REQUESTED RECORDS**

Sierra Club requests prompt production of the following:<sup>1</sup>

1. Any and all documentation related to or associated with EPA’s review of NPDES Draft Permit Number AL0002879 issued by ADEM to the public on August 19, 2020 for the Barry Plant,<sup>2</sup> including but not limited to:
  - a. Documentation of any correspondence between ADEM and EPA regarding ADEM’s approval, or consideration of approval or plan to approve, the 316(a) thermal variance for the Barry plant.
  - b. Documentation related to or associated with the United States EPA’s action to approve or disapprove, or otherwise provide any input on, or decision regarding, ADEM’s proposal in the Draft Permit to grant a variance for the Barry Plant’s thermal discharges under the Clean Water Act Section 316(a). See Draft Permit, ADEM Permit Rationale at 4, 10-11.
  - c. Any other existing documentation evidencing the process ADEM and EPA followed to comply with Section IV (J) (Technology-Based Variances) of the National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency Region 4, 14-15 (Apr. 23 2008)<sup>3</sup> with respect to the Draft Permit’s term proposing to grant Alabama Power Company a 316(a) variance for its Barry Plant. This includes, but is not limited to the statement that “No technology-based variance may be included in an NPDES permit unless the State’s approval [of the 316(a) variance] has been signed off by EPA.” *Id.* at Section IV(J)(3).
  - d. Any documentation reflecting or related to any EPA approval or disapproval, or “sign-off” of the proposed 316(a) thermal variance for the Barry Plant in the Draft Permit or any final permit for the Barry Plant. *Id.* at Section IV(J)(3).

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<sup>1</sup> Sierra Club has reviewed documents available on ADEM’s efilng system and not located the information that is the subject of this request.

<sup>2</sup> ADEM’s cover letter conveys this permit was sent to EPA Region 4 on July 23, 2020.

<sup>3</sup> Available at: <https://www.epa.gov/sites/production/files/2013-08/documents/al-moa-npdes.pdf>

2. Any existing amendments, modifications, or updates made to the National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency Region 4, dated April 23, 2008.

If available, all records are specifically requested in electronic format. In the instance that any of the requested records in electronic form is too large to provide via e-mail, the Sierra Club can provide a link to box.com or another online dropbox, allowing for easy upload of the records to an electronic folder.

Please convey the production by electronic email<sup>4</sup> to:

Sierra Club

[julie.kaplan@sierraclub.org](mailto:julie.kaplan@sierraclub.org)

[Olivia.Funk@sierraclub.org](mailto:Olivia.Funk@sierraclub.org)

Please produce the requested records on a rolling basis; at no point should the processing of records supplementing the production responsive to the request delay the production of responsive records.

If you are able to provide some records more rapidly than others, we ask that you please forward those records as they become available for production. If you ultimately withhold any responsive records, please include in your response an explanation as to which records or portions of records, if any, are being withheld and please identify the privilege or exemption being asserted and the justification for that privilege or exemption. If a record includes both exempt and non-exempt information, please provide those portions of the record that are not specifically exempted from production. Finally, if a record does not exist, please indicate that in your written response.

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$50. **All invoices should be billed to the Sierra Club Environmental Law Program, Attn: Julie Kaplan, 50 F Street, NW, Eighth Floor, Washington, DC 20001, but invoices should be sent to [Julie.kaplan@sierraclub.org](mailto:Julie.kaplan@sierraclub.org), as our offices are currently closed.**

I respectfully request that you waive all fees in connection with this request as provided by 5 U.S.C. § 552(a)(4)(A)(iii). The Sierra Club has spent years promoting the public interest through the development of policies that protect human health and the environment, and has routinely received fee waivers under FOIA.

The Sierra Club is a national, nonprofit, environmental organization with no commercial interest in obtaining the requested information. Instead, the Sierra Club intends to educate the public about the proposed activity, so that the public can access this important information regarding water pollution in their communities.

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<sup>4</sup> Due to our present work from home posture, we are not requesting hard copies.

As explained below, this FOIA request satisfies the factors listed in under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See* 32 C.F.R. §§ 286.12 (l), 518.19 (d).

1. *The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”* The requested records relate to information regarding EPA’s review of ADEM’s proposed 316(a) variance for the Barry plant. This activity is unquestionably “identifiable operations or activities of the government.” The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by a federal agency will meet this threshold” of identifiable operations or activities of the government.

2. *The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”* The FOIA Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in part on whether the requested documents provide information that is not already in the public domain. Sierra Club has searched both ADEM’s efilng portal, and Region 4’s website, and has concluded that the requested records are not currently in the public domain and are “likely to contribute” to an understanding of EPA’s activities and decisions.

3. *The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.*

Sierra Club and its members have long-standing experience and expertise in the subject area of FOIA requests, specifically, issues related to the Clean Water Act. Sierra Club also has a long-standing interest in government accountability and transparency.

Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club’s website, emailing and list serve distribution to our members across the U.S., and via public meetings and events. Every year the Sierra Club website receives 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. Sierra Club Insider, an electronic newsletter, is sent to over 850,000 people twice a month.

In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system. Sierra Club intends to share information received from this FOIA request with the public.

Sierra Club unquestionably has the “specialized knowledge” and “ability and

intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

4. *The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.* EPA Region 4 is called upon to review and approve or disapprove ADEM’s proposed grant of the 316(a) variance from thermal discharge limits for the Barry Plant. Documentation related to EPA’s review and decision making regarding that variance will enhance the public’s understanding of EPA’s approach to such variances – which is a required government operation. Without the disclosure, the public will have no information, thus the public’s understanding would be enhanced significantly. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

5. *Whether the requester has a commercial interest that would be furthered by the requested disclosure.* The Sierra Club has no commercial interest in the requested records. Nor does it have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a tax-exempt organization under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of the Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

6. *Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”* When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the “public interest” in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required. As noted above, the Sierra Club has no commercial interest in the requested records.

The Sierra Club respectfully requests, because the public will be the primary beneficiary of this requested information, that EPA waive all fees pursuant to 5 U.S.C. § 552(a)(4)(A).

Please feel free to e-mail me at [julie.kaplan@sierraclub.org](mailto:julie.kaplan@sierraclub.org), or call me at (301) 758 3786 to discuss any aspect of this request. Thank you in advance for your assistance in this matter.

Sincerely,

/s/

Julie Kaplan

Senior Attorney

[julie.kaplan@sierraclub.org](mailto:julie.kaplan@sierraclub.org)